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APPELLANT PRO SE:

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**IN THE
COURT OF APPEALS OF INDIANA**

CLINTON HAWKINS,
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A05-0608-CR-474

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Steven E. Platt, Judge
Cause No. 20D02-9907-CF-120

May 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Clinton Hawkins appeals from the denial of his petition for sentence modification to reduce his conviction for possession of cocaine from a Class A felony to a Class B felony. We affirm.

Issue

Hawkins raises three issues, only one of which is properly before this court. We restate that issue as whether the trial court properly denied his petition for modification of sentence.

Facts

On September 27, 1999, Hawkins entered into a written plea agreement for Class A felony possession of cocaine. The plea agreement read, in part, as follows:

The Defendant reserves his right to request a sentence modification to reduce his conviction to a Class B Felony. The State of Indiana will offer no objection to Defendant's request if he meets the following criteria: (1) serves the minimum sentence for a Class B Felony (6 years); (2) receives no significant conduct violations while in the D.O.C.; (3) obtains his G.E.D., if applicable; and (4) receives any treatment and/or counseling available to him through the D.O.C. The Defendant acknowledges that the modification to a Class "B" felony is not guaranteed. If the above criteria are met, the Defendant must still convince the Judge that the modification should be granted. The modification of the Defendant's sentence shall be entirely within the Court's discretion.

Appellant's App. p. 1. On December 6, 1999, the trial court sentenced Hawkins to the Indiana Department of Correction for a term of twenty years pursuant to the plea agreement, with seventy-eight days credit for time served.

On August 28, 2001, Hawkins filed his first pro se motion for modification of sentence. The State objected on the same day, and the trial court denied the motion on September 21, 2001. Hawkins filed his second pro se motion for modification of sentence on July 25, 2003, which the trial court denied on the same day. On June 26, 2006, Hawkins filed his third pro se motion for modification of sentence. The State filed an objection on July 6, 2006, and the trial court denied the motion on the same day. On July 19, 2006, Hawkins filed a pro se notice of the State's violation of the plea agreement and a response to the State's objection. On July 24, 2006, Hawkins filed a motion for reconsideration, which the trial court denied on the same day. Hawkins now appeals the denial of his third pro se motion for modification of sentence.

Analysis

Hawkins contends that the trial court erred in denying his motion for modification of sentence on the following three grounds: the State violated the terms of the plea agreement by objecting to his motion for modification of sentence, the plea agreement was illusory at its inception, and his trial counsel rendered ineffective assistance during the negotiation of the plea agreement and at the sentencing hearing. However, because a motion for sentence modification is clearly not the proper procedure for raising the last of these two issues we address only whether the trial court properly denied Hawkins's motion for modification of sentence because of the State's objection to it. See Robinson v. State, 805 N.E.2d 783, 786-87 (Ind. 2004) (holding that a motion to correct sentence may only be used to correct sentencing errors that are clear on the face of the judgment imposing the sentence in light of the statutory authority and that claims that require

consideration of the proceedings before, during, or after trial should be raised on direct appeal or by post-conviction proceedings, but may not be presented by way of a motion to correct sentence). We therefore turn to the issue whether the trial court properly denied Hawkins's motion for modification of sentence.

Sentencing is conducted within the discretion of the trial court and will be reversed only upon a showing of abuse of that discretion. State v. Fulkrod, 735 N.E.2d 851, 852 (Ind. Ct. App. 2000). Generally, a trial court has no authority over a defendant after it pronounces sentence. Id. However, a trial court may retain continuing jurisdiction after final judgment has been pronounced if such authority is derived from the judgment itself or granted to the court by statute or rule. Id.

Hawkins sought modification of his sentence pursuant to Indiana Code Section 35-38-1-17(b) which provides, in pertinent part, that "If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney." We have previously held that where the prosecuting attorney acquiesces in the petition for sentence modification under Indiana Code Section 35-38-1-17(b), the decision to grant or deny the motion is within the trial court's discretion. Id. at 854 (citing Marshall v. State, 563 N.E.2d 1341, 1343 (Ind. Ct. App. 1990), trans. denied). Where the prosecuting attorney opposes the petition for sentence modification under Indiana Code Section 35-38-1-17(b), the trial court lacks authority to modify the sentence. Id. Therefore, a trial court lacks the requisite jurisdiction to modify a sentence under Indiana Code Section 35-38-1-17(b)

unless the prosecuting attorney acquiesces in a defendant's petition for sentence modification. Id.

Hawkins filed the present motion for modification of sentence on June 26, 2006. The prosecuting attorney filed a timely objection to that motion on the grounds that Hawkins had not presented evidence of compliance with the terms set forth in the plea agreement, namely that Hawkins had failed to prove that he had (1) served the minimum six-year sentence for a Class B Felony, (2) received no significant conduct violations while committed to the Indiana Department of Correction, (3) obtained his G.E.D., or (4) that he received any treatment and/or counseling available to him through the Indiana Department of Correction. The prosecuting attorney further objected that Hawkins had merely presented an unverified motion for modification. Because Hawkins failed to present evidence of compliance with the terms of the plea agreement for purposes of sentence modification, the prosecuting attorney properly objected to the motion. As such, the trial court lacked the requisite jurisdiction to modify Hawkins's sentence under Indiana Code Section 35-38-1-17(b) because the prosecuting attorney failed to acquiesce in Hawkins's motion.¹

Conclusion

The trial court properly denied Hawkins's petition for sentence modification. We affirm.

¹ Even if the prosecuting attorney had not objected to Hawkins's motion, the decision to grant or deny the motion would still have been within the discretion of the trial court.

Affirmed.

NAJAM, J., and RILEY, J., concur.